Supreme Court, U.S.
FILED
JAN 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-897

In the Supreme Court of the United States

OCTOBER TERM, 1985

SERGE KOWALCHUK, A/K/A SERHIJ KOWALCZUK,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's position with a local Ukrainian militia during World War II constituted "voluntary assistance" to the enemy, thus rendering him ineligible for admission to the United States under the Displaced Persons Act of 1948.

2. Whether misrepresentations made by petitioner upon applying for entry into this country were "material," thus warranting his denaturalization.

3. Whether petitioner's due process rights were violated by his alleged inability to obtain evidence in the Soviet Union.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-64a) is reported at 773 F.2d 488. The opinion of the panel (Pet. App. 65a-122a) was withdrawn from publication. The opinion of the district court (Pet. App. 123a-144a) is reported at 571 F. Supp. 72.

JURISDICTION

The judgment of the en banc court of appeals was entered on September 23, 1985. The petition for a writ of certiorari was filed on November 22, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The government brought this suit in the United States District Court for the Eastern District of Pennsylvania seeking to revoke petitioner's naturalization pursuant to

8 U.S.C. 1451(a). The complaint alleged that petitioner's citizenship was illegally procured because he had assisted in the persecution of civilians and voluntarily assisted the enemy during World War II, and it alleged that he had misrepresented material facts upon entering this country. The district court ordered petitioner's citizenship revoked, and the court of appeals affirmed.

1. The evidence at trial showed that during World War II the Nazis organized a local militia (schutzmannschaft) in the Ukrainian city of Lubomyl and that this group assisted the occupying Nazi forces in the persecution of Jews and other civilians.[1] Petitioner occupied a "position of some responsibility" (Pet. App. 140a) in this militia. He prepared duty rosters for patrols in the Jewish ghetto in Lubomyl and arrest and other reports generated as a result of the work of these patrols. The patrols routinely beat persons inside the ghetto and confiscated their valuables; members of the militia also accompanied the Nazis when these atrocities were committed. In September and October 1942, the remaining Jewish population of Lubomyl—some 5,000-6,000 people—was massacred by the Nazis with the assistance of "significant numbers of Ukrainian militiamen," though not necessarily from the Lubomyl militia (*id.* at 140a-141a, 5a). In addition to his work in the militia, petitioner was responsible for the distribution of food and other

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[1]Petitioner asserts (Pet. 8) that the "role played by the Lubomyl schutzmannschaft in the persecution is unclear," but both lower courts found that the militia did play a significant role in assisting the persecution. The district court found that members of the schutzmannschaft enforced numerous oppressive policies, including beating Jews for violating curfew or failing to wear the proper insignia and confiscating the valuables of Jews, and also, at a minimum, accompanied the Nazis when civilians were rounded up for forced labor or arrested and ultimately murdered (Pet. App. 141a). The court of appeals recognized that the schutzmannschaft was of "crucial importance to the Germans in carrying out the policies of the German army in the Ukraine" (*id.* at 4a).

supplies to persons employed by the local government, as well as supplies to other local governments in nearby communities. *Id.* at 138a-142a.

When the Nazis began retreating from the Ukraine in March 1944, petitioner and his younger brother voluntarily accompanied them to Czechoslovakia. Eventually, petitioner and his brother made their way to a displaced persons camp in Austria run by the International Refugee Organization (IRO) of the United Nations. There petitioner concealed from officials both his residence in Lubomyl and his employment with the militia. On an official form supplied by the IRO, petitioner falsely stated that he had lived in Kremianec, Poland, from September 1939 to March 1944, and that he had been employed during this time as a tailor's apprentice. Petitioner again misrepresented these same facts when he completed another official form, a fragebogen, in order to gain entry to this country.[2] Petitioner also concealed the fact that he was sent for special training by the Nazi-controlled government of Lubomyl. In addition, he falsely stated that he had been forcibly displaced from his home, although in fact he had voluntarily departed with the Nazis. Pet. App. 7a-9a. Before a visa was issued to petitioner, an investigation was conducted by the Displaced Persons Commission and petitioner was interviewed by the vice-consul of the United States at Salzburg, Austria. Once again, petitioner committed misrepresentations by swearing that the information contained in the fragebogen was correct. *Id.* at 19a.

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[2]Petitioner states (Pet. 10) that "he testified [at the trial] that he did not realize that [the form] would be used specifically for the purpose of applying for United States immigration * * *." This testimony evidently was discredited by the trial court, however, which found that in submitting the fragebogen "the defendant plainly was making representations for the purpose of gaining entry to the United States" (Pet. App. 142a). The court of appeals found that the "evidence of willful misrepresentation, concealment, and materiality is clear, convincing, and unequivocal" (*id.* at 19a).

2. The district court granted the petition to revoke petitioner's naturalization (Pet. App. 123a-144a). Although the court did not credit all of the government's testimony, it found that disclosure of petitioner's membership in the militia, at the very least, would have led to further inquiry regarding his activities, and that, regardless of the extent of petitioner's direct personal involvement in atrocities, it was "quite probable" that consular officials would have denied him a visa because of his activities with the militia (*id.* at 143a). The court concluded that petitioner was not a genuine refugee "of concern" to the IRO—and hence not eligible for the benefits of the Displaced Persons Act (DPA)—because he assisted the Nazis in persecuting civilians and because the schutzmannschaft voluntarily assisted enemy forces. The court also concluded that petitioner made a willful misrepresentation for the purpose of gaining admission to the United States. Hence, his visa and his citizenship were illegally procured. *Id.* at 144a.

3. The court of appeals, sitting en banc, affirmed the district court's decision (Pet. App. 1a-64a). The court held that the evidence was sufficient to demonstrate voluntary assistance to the enemy and willful misrepresentation of material facts, thereby disqualifying petitioner from entry into this country under the Displaced Persons Act. Because the court found that, had petitioner given truthful answers, the facts disclosed would have made him ineligible for a visa, it resolved the materiality question under the first prong of the test set forth by this Court in *Chaunt* v. *United States*, 364 U.S. 350 (1960), and thus found it unnecessary to address the meaning of the second prong of the test (Pet. App. 20a). The court also rejected petitioner's contention that he was deprived of due process because the Soviet Union denied his counsel the opportunity to visit Lubomyl, noting that the same limitations had been imposed upon government counsel (*id.* at 20a-21a). Four judges dissented (*id.* at 22a-64a).

ARGUMENT

Petitioner makes several objections to the decision of the court of appeals upholding the revocation of his naturalization. Each of these is factbound and was correctly rejected after exhaustive consideration by the en banc court of appeals. The decision below does not conflict with any decision of this Court or of another court of appeals, and further review is not warranted.

1. Petitioner contends (Pet. 12-15) that the court of appeals erred in finding that he rendered "voluntary assistance" to the enemy, within the meaning of the IRO, and hence was not a refugee "of concern" eligible for a visa under the DPA. This contention is without merit.

Petitioner argues (Pet. 13) that "voluntary assistance" requires some showing of a "specific purpose of aiding the enemy." The only support cited for this reading is a footnote to § 2(b) of the IRO Constitution, which does not address the situation presented here at all. The footnote explains that the IRO Constitution did not intend to include in "voluntary assistance to the enemy" those functions considered to be the "[m]ere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy." 62 Stat. 3052. That exception has no application to petitioner, because it was undisputed at trial that the schutzmannschaft did not represent the continuation of a peacetime force, but rather was set up by the Nazis and was used to assist them in activities with no peacetime counterpart—such as routine beatings and persecution of Jews. Petitioner voluntarily joined the schutzmannschaft during the war, occupied a "position of some responsibility" in it (Pet. App. 140a), and knew that the schutzmannschaft substantially assisted the Nazis in their activities, including the brutal persecution of Lubomyl's Jewish population. Indeed, petitioner's efforts led the Nazis

to give him a special training course (*id.* at 4a).[3] It is inconceivable that this conduct did not constitute "voluntary assistance to the enemy" within the meaning of the Displaced Persons Act.[4]

2. Petitioner contends (Pet. 15-17) that the court of appeals erred in concluding that his misrepresentations were "material." This contention appears to rest on petitioner's unfounded assertion (Pet. 16) that he did not conceal any facts on December 29, 1949, the day that he obtained his visa, but simply relied on the information contained on a form that he had previously completed. In fact, the court of appeals found, based on testimony at trial that applicants were always required to swear that the contents of the fragebogen were true, that petitioner did conceal material facts on December 29, 1949, when he swore to the truth of the false statements in the fragebogen concerning his wartime residence and occupation (Pet. App. 19a). Petitioner does not dispute that such misrepresentations at the visa stage would be material. Thus, there is no occasion here to consider petitioner's argument (which we believe in any event to be seriously flawed) that a

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[3]The facts here present a considerably stronger case for voluntary assistance than the court of appeals cases cited by petitioner (Pet. 14), *United States* v. *Sprogis*, 763 F.2d 115, 122 (2d Cir. 1985), and *Laipenieks* v. *INS*, 750 F.2d 1427, 1432 (9th Cir. 1985). In any event, those cases are inapposite because they deal with assistance in *persecution*, an issue that the court of appeals expressly declined to reach (Pet. App. 21a). Indeed, *Laipenieks* did not even involve the DPA; the question was deportability under a relatively recent statute, 8 U.S.C. 1251(a)(19).

[4]In any event, the court of appeals correctly found an "independent ground for ineligibility for a visa in this case" because Section 13 of the DPA precluded issuance of a visa to any "person who is or has been a member of, or participated in, any movement which is or has been hostile to the United States * * *" (Pet. App. 18a n.11). Thus, even if petitioner were correct that he met the DPA's definition of a refugee "of concern," he still was not eligible for a visa under the DPA.

different standard of materiality should apply to misrepresentations made at the pre-visa stage or prior to 1949.[5]

3. Petitioner contends (Pet. 19-21) that he was denied due process because the Soviet Union did not allow his lawyer to visit Lubomyl to investigate or interview witnesses. This contention was correctly rejected by the court of appeals (Pet. App. 20a-21a). Even assuming that something akin to Sixth Amendment standards ought to apply in this civil action, petitioner plainly failed to make the threshold showing required by *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 872 (1982), that he was denied testimony that would have been material to his defense. See also *Moore* v. *Illinois*, 408 U.S. 786, 794 (1972). Indeed, petitioner's claim is considerably weaker than that of the defendant in *Valenzuela-Bernal*, who claimed that the government's deportation of potential witnesses deprived him of their testimony. Here, petitioner does not complain of any act by the government that affected potential testimony for the defense; rather, his claim is that a *foreign county* prevented him from *possibly* discovering useful evidence (Pet. 20). The Due Process Clause does not guarantee a defendant access to every bit of

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[5]Petitioner argues (Pet. 18) that there is a conflict in the circuits with respect to the meaning of the "second prong" of the *Chaunt* materiality test, a question left open by this Court in *Fedorenko* v. *United States*, 449 U.S. 490, 518 n.40 (1981). He alleges that the Tenth Circuit in *United States* v. *Sheshtawy*, 714 F.2d 1038, 1040-1041 (1983), has rejected the interpretation adopted by the First, Second, Fifth, Sixth, and Eleventh Circuits. See generally *Maikovskis* v. *INS*, 773 F.2d 435, 441 (2d Cir. 1985), and cases cited therein. The court of appeals correctly found, however, that petitioner's misrepresentations were material under the first prong of the test, and therefore he was subject to denaturalization no matter what the correct interpretation of the second prong. Pet. App. 20a. Accordingly, as petitioner acknowledges (Pet. 11), the court of appeals explicitly declined to express any view on that issue, and the decision below presents no occasion to resolve it. Pet. App. 20a.

information he might wish to acquire, at least when the impediment to its acquisition is beyond the control of the government.[6]

Moreover, the court of appeals found that the Soviet Union imposed upon the government the same limitations that it imposed upon petitioner with respect to interviewing witnesses and that petitioner had failed adequately to pursue the discovery opportunities that were made available to him. In particular, petitioner failed to make a timely request to interview prospective witnesses and, even after petitioner's counsel was in the Soviet Union, he merely requested informally a chance to interview these individuals rather than proceeding through appropriate channels. Pet. App. 20a-21a.

We note petitioner's complaint (Pet. 21) in support of his due process contention that the "unique 40-year time span" that exists here presents problems in producing evidence. The government, of course, faces the same problems, and it is the government that must prove its case by clear and convincing evidence. What must be emphasized in this regard is that this time lapse is solely the responsibility of

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[6]For example, it is clear that the government has no general obligation to immunize a witness so that he can testify for the defense. Except in the most unusual circumstances, the fact that a witness who could provide testimony material and favorable to the defense fails to testify because the government declines to grant him immunity does not establish a due process violation. See *McGee* v. *Crist*, 739 F.2d 505, 509 (10th Cir. 1984); *Autry* v. *Estelle*, 706 F.2d 1394, 1400-1403 (5th Cir. 1983), cert. denied, 465 U.S. 1085 (1984); *United States* v. *Turkish*, 623 F.2d 769, 776 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964, 972 (3d Cir. 1980). See also *United States* v. *Bazzano*, 712 F.2d 826, 851 (3d Cir. 1983) (Adams, J., dissenting), cert. denied, 465 U.S. 1078 (1984). A fortiori, there was no such violation here where the United States government had no control over the Soviet Union's refusal to allow petitioner's counsel to visit Lubomyl.

petitioner. Had he told the truth about his wartime activities to government officials when he sought admission to this country, the question of his eligibility for a visa could have been resolved when the evidence was fresh. It is the height of audacity for petitioner to frustrate government investigators by lying about his past in order to obtain a visa and then, when ultimately his lies are exposed after many years, to claim that he is entitled to special consideration because of the lapse of time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1986

DOJ-1986-01